SUPREME COURT, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 569

CHINA UNION LINES, LTD., a corporation,
Petitioner,

vs.

STATES STEAMSHIP COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner China Union Lines, Ltd. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above entitled case on June 6, 1967.

OPINIONS OF THE COURTS BELOW

The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, page i, is reported in 1966 AMC 657. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, *infra*, page vii, is reported in 378 F.2d 356 (9th Cir. 1967). The judgment of the Court of Appeals for the Ninth Circuit is printed in Appendix C hereto, *infra*, page x.

JURISDICTION

The jurisdiction of the District Court was invoked by reason of respondent's libel against the petitioner as a result of a maritime collision. 28 U.S.C. 1333. The petitioner filed a cross-libel, invoking the jurisdiction of the District Court pursuant to 28 U.S.C. 1333.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 6, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Is the established principle of general maritime law that a harmed vessel must mitigate damages as a prerequisite to their recovery to be altered for the first time by indirection by United States maritime subsidy law?

STATUTES INVOLVED

Merchant Marine Act of 1936, 46 U.S.C. Sec. 1101 ff, and particularly portions of 46 U.S.C. Sec. 1176:

> Sec. 1176. Every contract for an operating-differential subsidy under this subchapter shall provide . . . (7) that whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States, as defined in section 1155 of this title, except when it is necessary to purchase supplies and equipment outside the United States to enable such vessel to continue and complete her voyage, and the operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an emergency. . . ."

STATEMENT OF THE CASE

On August 26, 1960, the MV UNION STAR, owned by petitioner, and the SS ILLINOIS, owned by respondent, collided in the territorial waters of Viet Nam (R. 78). After making temporary repairs, the vessels proceeded on their respective ways. The MV UNION STAR was eventually repaired in Taiwan at a cost of $3,262.75, and the SS ILLINOIS repaired in the United States at a cost of $40,053.60. (Stipulation re Damages, R. 85).

Respondent, owner of the SS ILLINOIS, filed a libel in the United States (R. 3-6) and petitioner filed a cross-libel (R. 14-20). During the course of the hearing before the District Court, petitioner objected to the repair costs to the SS ILLINOIS claimed as damages by respondent and sought to introduce evidence that those repairs could

have been accomplished in Japan for a total cost of $17,222.00 (Tr. 298:7-299:1). Respondent's objection to petitioner's offer of proof was sustained by the District Court on the grounds of "irrelevance" (Tr. 306:5-8). The District Court subsequently found that the terms of the operating-differential subsidy contract with the United States Government under which the SS ILLINOIS was being operated, "required that the ILLINOIS collision repairs be effected in a shipyard in the United States". (Finding of Fact IX, R. 92). Consequently, the District Court allowed respondent to include in its damages the inflated U.S. repair costs. On December 1, 1965 the District Court filed its Final Decree equally dividing damages on this basis and awarding respondent the sum of $20,937.48.[1]

Petitioner sought review of this Decree in the Court of Appeals for the Ninth Circuit. The case was argued and submitted on April 14, 1967. On June 6, 1967, the court below affirmed that the offer of proof was irrelevant.

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[1]The parties stipulated in the District Court that a proportional damage rule was applicable (Finding of Fact VIII, R. 91, 92) but the District Court found the faults to be equal. Although the trial court's decision to divide damages equally was raised on appeal by petitioner, the decision of the Ninth Circuit contains no express ruling on this subject.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT HAS INCORRECTLY INTERPRETED THE SUBSIDY PROVISIONS OF THE MERCHANT MARINE ACT OF 1936 TO ABROGATE THE HISTORIC AND ESTABLISHED PRINCIPLE THAT UNREASONABLE DAMAGE COSTS ARE NOT RECOVERABLE UNDER THE GENERAL MARITIME LAW, A QUESTION NOT PREVIOUSLY REVIEWED BY THIS COURT

A. The Merchant Marine Act of 1936 Neither Relieves an Injured Party of Its Obligation to Mitigate Damages nor Serves As a Defense for Failure to So Minimize.

The general maritime law requires that an injured party mitigate its damages as a condition of recovery. *Kossick v. United Fruit Co.* (1961) 365 U.S. 731, 737. That principle reflects the universally accepted tenent of tort law that an injured party has an obligation not to exaggerate but to do everything possible to minimize his damages. American Law Institute, Restatement of Torts, Sec. 918.

Judicial application of the recognized duty of the injured party to mitigate damages recognizes the international character of shipping by finding that a shipowner may only recover the actual costs of repair or replacement parts if obtained in an available world port in which the price is lowest. In *Navigazione Libera T.S.A. v. Newtown Creek Towing Co.* (2d Cir. 1938) 98 F.2d 694, the court held that the shipowner was required to buy a replacement propeller where the market cost was lowest, Trieste and not New York. See also *Zeller Marine Corp. v. Nessa Corp.* (2d Cir. 1948) 166 F.2d 32.

The American shipowner in this action made no effort to refute petitioner's contention that the repair cost of

the SS ILLINOIS incurred in the United States, (which was several times the repair cost available in the Orient (Stipulation Re Damages, States Steamship Co., Item 9, R. 85)) was unreasonable, and that it had failed to mitigate its damages. In response, its sole defense was that its subsidy contract with the United States Government "required" that it repair its vessel in the United States (Tr. 194:1-15; 195:15-25; 303:12; 304:25).

The District Court found that:

> "At all relevant times the SS ILLINOIS was being operated by libelant States Steamship Company under the terms of an operating differential subsidy contract with the United States Government, the terms of which required that the ILLINOIS collision repairs be effected in a shipyard in the United States." (Finding of Fact IX, R. 92).

On that basis the District Court rejected as irrelevant evidence offered to establish both that the costs of repair in the Orient were substantially less than those incurred by the American shipowner in the U.S. and that its recovery should be limited to damages based on the Orient cost figures.

The Court of Appeals affirmed the District Court's decision on the ground that:

> "Had appellee undertaken repair in the Orient, damages would not have been minimized but maximized, taking into consideration the connected loss (possible or probable) of the subsidy revenue." 378 F.2d 357.

Neither court gives any statutory authority for this conclusion. Further, not the place of repair but rather

the measure of damages was at issue. The lower court in holding as it did unwarrantedly overrides an established principle of law, destroys the basis of the divided damages award, and extends the effect of the subsidy scheme under the Merchant Marine Act of 1936 beyond its intended scope, thus presenting a significant question not previously decided by this Court.

B. The Merchant Marine Act of 1936 Does Not Authorize Imposition of Inflated Damage Costs Upon a Tort-feasor and to Do So Is an Unwarranted Violation of an Established General Maritime Rule of Damages.

No provision of the subsidy contract or of Title 46 of the United States Code was found by the court below to require U.S. courts to award inflated American repair costs as damages.

The place of repair of the American vessel was never at issue. The question was the measure of the recoverable damages.

The applicable sections of the U.S. Code do not authorize an American shipowner to claim the full amount of its American repair costs as damages and do not suggest that the courts award such excess costs as damages. American courts are not required by the Merchant Marine Act to modify the rule of mitigation of damages and they should not do so.

The question before the court below and the District Court was the measure of damages to be assessed against the petitioner. This question was not answered but rather avoided by discussing the hypothetical loss of subsidy. However, to allow the decision of the lower court to stand will result in the rule that the Merchant Marine Act of

1936 requires American courts to impose inflated American repair cost as damages in contravention of the general maritime law on mitigation of damages.

II

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT THAT A VOLUNTARY CONTRACTUAL ARRANGEMENT CANNOT IMPOSE UNREASONABLE LIABILITIES UPON A TORT-FEASOR

Mr. Justice Holmes held for the Court in *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, that:

> ". . . a tort to the personal property of one does not make the tort-feasor liable to another merely because the injured person is under a contract with that other, unknown to the doer of the wrong." 275 U.S. 309.

In *Robins* a time charterer was held to have no right to recover from a dry dock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during dry docking which was required by the charter party.

The decision in *Robins Dry Dock* reflects the historic rule of *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rept. 145 (1854) that the breaching party cannot be held to damages beyond the reasonable contemplation of the parties to a transaction. That principle is violated by the decision below. The Court offered no rationale, legislative or jurisprudential, for permitting the subsidy arrangement between respondent and the United States to violate established equitable principles. The result is of

tremendous significance to any vessel so unfortunate as to be in collision with a vessel subsidized by the United States.[2]

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

San Francisco, California
August 30, 1967

Respectfully submitted,
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[2]There was no contractual relationship between the parties but, as this Court has emphasized, the full scope of the established admiralty rules of damages must prevail over contrary provisions and the absence of a contractual relationship between the parties is not conclusive in adjudicating their respective rights. *Weyerhaeuser S.S. Co. v. United States* (1963) 372 U.S. 597, 603.

(Appendices A, B and C Follow)